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FILED
08 JUL -7 PM 4:11
CLARK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: *ECU* DEPUTY

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

'08 CV 1210 JLS NLS

LYMS, INC.; WENDY YOUNGREN AND
CATHY MEANS AS SUCCESSOR TRUSTEES
OF THE LYMOS 401(k) PLAN,
Plaintiffs,
vs.

BRUCE MILLIMAKI AND MICHAEL
EGGERT, FORMER TRUSTEES OF THE
LYMOS 401(k) PLAN; GARY BERMAN,
INDIVIDUALLY,
Defendants

Case No.:
COMPLAINT for
**BREACHES OF FIDUCIARY DUTY UNDER
THE EMPLOYEE RETIREMENT INCOME
SECURITY ACT ("ERISA"), 29 U.S.C. §1001
et seq. AND BREACH OF CONTRACT
UNDER 29 USC § 1367(a)**

JUDGE:

SERVICE VIA CERTIFIED MAIL:

THE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR AND THE INTERNAL
REVENUE SERVICE AS REQUIRED UNDER ERISA, 29 U.S.C. §1132(h).

1 Plaintiffs LYMS, Inc. (the "Plan Sponsor") and Wendy Youngren and Cathy Means, Successor
2 Trustees of the LYMOS 401(k) Plan (the "Successor Trustees" and the "Plan", respectively),
3 hereby allege:

4 **PARTIES AND PRELIMINARIES**

5 1. The Plan Sponsor, LYMS, Inc., is a California corporation organized and existing under
6 the laws of the State of California with its principal place of business located in the County of
7 San Diego. It provides accounting and related services together with its affiliated company,
8 Lipsey, Youngren, Means Ogren & Sandberg LLP.

9 2. The Successor Trustees, Wendy Youngren and Cathy Means, are certified public
10 accountants residing and working in the County of San Diego.

11 3. The Plan is an employee pension benefit plan as defined under ERISA, 29 U.S.C. §
12 1002(2). The Plan provides retirement benefits to the employees of the Plan Sponsor and its
13 related company.

14 4. Bruce Millimaki ("Millimaki") is a certified public accountant residing and working in
15 the County of San Diego.

16 5. Michael Eggert ("Eggert") is a certified public accountant residing and working in the
17 County of San Diego.

18 6. Gary Berman ("Berman"), doing business as L & S Pension Services, is a third party
19 administrator working in San Diego County. Mr. Berman previously provided administrative
20 services to the Plan Sponsor for operation of the Plan.

21 **JURISDICTION AND VENUE**

22 7. The jurisdiction of this court over the subject matter of this action is predicated on 28
23 USC § 1331. This action brings breach of fiduciary duty claims arising under 29 U.S.C.
24 §1132(a)(2) for relief under 29 U.S.C. §1109 and claims under 29 U.S.C. §1132(a)(3) for
25 equitable relief concerning defendants' mismanagement of a qualified retirement plan under the
26 Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"). This
27 Court has exclusive subject matter jurisdiction over these claims pursuant to 29 U.S.C.
28 §1132(e)(1).

29 8. This complaint also brings supplemental state law breach of contract claims against
30 defendant Berman under 28 U.S.C. §1367(a).

1 9. Venue is proper in this court district under 29 U.S.C. §1132(e)(2) because the Plan is
2 administered here and all of the defendants reside and work.

3
4 **FACTUAL BACKGROUND**

5 **The Company and Its Predecessors**

6 10. In approximately 1991, Millimaki joined Robert Lipsey ("Lipsey"), a certified Public
7 Accountant and founding member, as a partner in a firm then known as Robert Lipsey &
8 Company (the "Company"). RL&C engaged in the business of public accounting, with its
9 headquarters and principal place of business in San Diego County.

10 11. In or about 1992, RL&C became a professional corporation, Robert Lipsey & Co., Inc.
11 The professional corporation has been renamed and reorganized over time resulting in its present
12 form as LYMS, Inc. (the "Plan Sponsor"). The affiliated company, formed in or about 2001, was
13 then known as Lipsey, Millimaki & Company, CPAs LLP and is now known as Lipsey,
14 Youngren, Means Ogren & Sandberg LLP ("LYMOS"). LYMS, Inc. and LYMOS together
15 constitute the Company.

16 12. From approximately 1991 through June 30, 2005, Lipsey and Millimaki were partners or
17 shareholders in the Company and its predecessors. During the existence of those firms, Lipsey
18 and Millimaki practiced accounting together for approximately 15 years.

19 13. In or about December 2004, Millimaki and Eggert, a professional employee of the
20 Company, advised Lipsey that they desired to disassociate from the Company. By July 2005,
21 Millimaki, Eggert and a number of other Company employees had moved out of the Company's
22 offices and begun work with Millimaki Eggert LLP ("M&E"), a competing accounting firm
23 formed by Millimaki and Eggert.

24 14. The circumstances surrounding the breakup of the Company and the departure of
25 Millimaki and Eggert ultimately lead to the discovery of facts that form the basis of the claims
26 for relief in this action, as well as two state court proceedings consolidated as one action:
27 *Millimaki v. Lipsey et al*, and *Lipsey v. Millimaki et al*, San Diego Superior Court case No. GIC
28 849308/860755 (2006)(the "Dissolution Cases").

29 //

30 //

The Plan and Its Predecessors

15. Since October 1, 1991, the Plan Sponsor and its predecessors have sponsored a tax-exempt qualified employee retirement plan (the "Plan") in which certain employees of the Company and its predecessors were eligible to participate. The Plan is currently known as the LYMOS 401(k) Plan.

Millimaki and Eggert's Failure to comply with ERISA's Fiduciary Standards

16. During the period from October 1991 through June 2005, Millimaki assumed sole fiduciary responsibility for the operation and administration of the Plan on behalf of the Plan Sponsor. Millimaki handled all of the responsibilities of the ERISA (Employee Retirement Income Security Act of 1974, as amended) plan administrator¹, supervising all administrative matters related to the operation of the Plan. Millimaki retained the services of Gary Berman of L & S Pension Services to act as the contract administrator for the Plan and to assist Millimaki in his role as the ERISA Plan Administrator.

17. Millimaki was a Plan trustee from the adoption date of the Plan. Eggert was a trustee from December 9, 1998 until both Millimaki and Eggert were removed in 2005, and in this capacity, they were responsible for the management and disposition of the Plan's assets.

18. Cathy Means and Wendy Youngren were appointed as Successor Trustees effective July 1, 2005 and Bruce Millimaki and Michael Eggert were removed as Trustees on July 21, 2005.

Millimaki's and Eggert's Refusal to Step Down As Plan Trustees

19. As is common in business dissolutions, the parties disagreed on the value of the Company interest held by Millimaki. Attempts to resolve the various disputes by settlement failed leading to the filing of the Dissolution Cases.

20. Millimaki and Eggert left the Company on June 30, 2005. In early July of 2005, Eggert informed the Company that no other trustees would be allowed to act on behalf of the Plan until he and Millimaki had disbursed all the funds from the Plan (at some unspecified future time).

¹ As defined under ERISA §3 (16)(A), 29 U.S.C. §1002 (16)(A).

1 Millimaki and Eggert continued to act as Plan trustees for more than six months after leaving the
2 Company. During this time, Millimaki and Eggert filed Forms 5500 for the Plan (required
3 information returns), made unauthorized distributions of money from accounts of the Plan to
4 themselves and their Plan, and filed Forms 1099R for the Plan.

5
6 21. On July 21, 2005, the Company gave Millimaki and Eggert written notice that that they
7 were terminated as trustees of the Plan effective as of thirty days after receipt of the notice. The
8 termination notice specified that Millimaki and Eggert were required to return all Plan
9 documents and records and to provide the Successor Trustees with a final trust accounting of the
10 Plan assets (as required by ERISA and the Plan document).

11 22. Notwithstanding the written termination notice, Millimaki and Eggert consistently failed
12 and refused to step aside as trustees of the Plan. Instead, Millimaki and Eggert continued to
13 purport to act as trustees of the Plan until sometime in 2006. Moreover, as alleged in more detail
14 below, Millimaki and Eggert refused to turn over the Plan's records and documents or to provide
15 the required accounting to the Plan's Successor Trustees, thereby hindering the Successor
16 Trustees in the performance of their duties.

17
18 23. Millimaki's and Eggert's above-described conduct reflects their intentional disregard of
19 the fiduciary and other duties imposed upon them as trustees of the Plan, their repudiation of the
20 Plan's governing documents, and their willful refusal to provide Plan accounting and other
21 information as required under ERISA.

22
23 24. Throughout the Dissolution Cases settlement negotiations, Millimaki expressly and
24 implicitly stated that he was in possession of accounting records and other documents covering
25 his approximately 15 years as the Plan Administrator and a trustee of the Plan. Neither the
26 Successor Trustees nor the Company had any knowledge or information indicating that
27 Millimaki, Eggert, and Berman **did not**, in fact, have complete or adequate accounting records or
28 other documentation concerning the Plan.

29 25. Under a proposed settlement agreement in the Dissolution Cases, Millimaki and Eggert
30 agreed to cease purporting to act on behalf of the Plan, and to notify any affected third parties

1 that they were no longer Plan trustees. The proposed agreement also required Millimaki and
2 Eggert to deliver, on or before March 13, 2006, all accounting records and other documents
3 concerning the Plan that they had obtained in their capacity as trustees of the Plan.

4 26. On March 13, 2006, Millimaki and Eggert again failed to deliver the necessary Plan
5 records, providing only a small package of brokerage statements. At the time, Millimaki and
6 Eggert claimed not to have any other records pertaining to the Plan, an assertion that was both
7 inconceivable in light of their long tenure as trustees, and inconsistent with their continuing
8 purported actions on behalf of the Plan.

9
10 27. As a result, the Successor Trustees and the Company insisted that Millimaki and Eggert
11 produce all of the Plan records and documents and declined to execute the proposed settlement
12 agreement until Millimaki and Eggert did so. In response, Millimaki and Eggert claimed that
13 they had left the remaining Plan records in the Company's offices upon their departure, that the
14 Company or its personnel must have lost the documents, and that the only Plan-related
15 documents in their possession consisted of a small number of investment brokerage statements.

16
17 28. Some time later, Millimaki and Eggert, through Berman, finally produced partial
18 accounting records for the Plan. Those records were incomplete and full of errors and
19 inaccuracies. Among other inadequacies, the trust accounting prepared by Berman and used to
20 prepare the Forms 5500 for the Plan had inconsistent ending and beginning balances from year to
21 year.

22
23 29. It soon became evident why Millimaki and Eggert had refused either to step down as Plan
24 trustees or to provide any records or documents concerning the Plan: they were attempting to
25 conceal their mismanagement of and potential problems with the Plan. The Plan Sponsor then
26 realized that the potential costs and liabilities to the Plan and to the Company as a result of the
27 former trustees' conduct -- all of which Millimaki and Eggert had attempted to conceal -- were
28 unquantifiable, might be extreme, and would certainly affect the value of the firm at the time of
29 his departure, which was a key variable in any settlement discussions. As a result, the parties did
30 not reach any binding, written agreement to settle the Dissolution Cases.

1 30. Eventually, Millimaki filed a motion for the appointment of a receiver or the issuance of
2 an injunction which the state court declined, conditioned on the Company's agreement to deposit
3 \$230,000 into a court-supervised escrow account pending the outcome of the Dissolution, to be
4 disbursed on further order of the state court. To date, the state court has approved the
5 distribution of \$190,000 to Millimaki and retains the sum of \$40,000 in an interest bearing
6 escrow pending resolution of the ERISA claims. In addition, the court determined that all issues
7 in the case, other than the parties' respective ERISA rights and remedies, were resolved and
8 dismissed. By order dated January 5, 2007 the court permitted Millimaki to retain the \$190,000,
9 without prejudice to the rights of the Successor Trustees, the Company, and the Plan to seek
10 repayment of those funds in connection with their claims for mismanagement of the Plan by
11 Millimaki and Eggert.
12

13 14 **Discovery of Plan Irregularities** 15

16 31. During and after the settlement negotiations described above, the Company and the
17 Plan's Successor Trustees attempted to evaluate the status of the Plan, its accounting records, and
18 its compliance with applicable laws and regulations. Toward that end, the Company engaged
19 separate consultants and legal advisors with expertise in qualified retirement plans.
20

21 32. The Plan's Successor Trustees, as well as the advisors and attorneys hired by the
22 Company, were hampered in their efforts to investigate the status of the Plan by Millimaki's and
23 Eggert's continuing refusal to turn over the Plan's trust accounting records and other documents.
24 After the collapse of settlement negotiations, however, Millimaki, Eggert, and Berman finally
25 began to provide some of the requested documents.

26 33. Subsequent review of those documents by the Plan's Successor Trustees and their
27 advisors revealed that a number of compliance failures and other irregularities occurred during
28 Millimaki's and Eggert's tenures as former trustees of the Plan. Those shortcomings include, but
29 are not necessarily limited to, the following:
30

1 (a) Failure to amend the Plan properly for legal requirements necessary to
2 maintain the tax-qualification of the Plan;

3 (b) Refusal to relinquish control of the Plan assets following their removal as
4 trustees;

5 (c) Refusal to provide the Successor Trustees with Plan documents and
6 records and refusal to cooperate in good faith with the Successor Trustees, all in violation of
7 their ERISA fiduciary responsibilities;

8 (d) Failure properly to account for the Plan's assets, and failure to either adopt
9 and implement an ERISA Investment Policy Statement or to obtain professional investment
10 advice sufficient to comply with their fiduciary responsibilities under ERISA (see, e.g., 29 CFR
11 §2509.94-2).
12

13 (e) Approval of a "rollover transaction" involving a Plan participant, the
14 source, origin and amount of which have been unverifiable, leading the Trustees to conclude that
15 this "rollover" may not constitute a qualified rollover and may, because of the facts involved,
16 constitute an abusive tax avoidance transaction.
17

18 34. In connection with the acts and omissions described above, Millimaki and Eggert
19 engaged in conduct that constitutes, at a minimum, gross mismanagement of the Plan and may
20 reflect intentional wrongdoing. Moreover, Millimaki and Eggert were aided and abetted in this
21 conduct by Berman, in his role as contract administrator².
22

23 The VCP Submission

24 35. In the meantime, the Company, the Plan, and the Successor Trustees continued working
25 with their ERISA consultants and attorneys to finalize and file a voluntary compliance program
26

27 ² Plaintiffs subsequently learned that although Millimaki described Berman as the Plan's "administrator",
28 Millimaki, on behalf of the Company, paid Berman no fees in this capacity. Plaintiffs also learned that
29 the compensation arrangement between Millimaki and Berman was that Millimaki would refer clients to
30 Berman in exchange for advice from Berman.

1 (“VCP”) submission to the Internal Revenue Service (“IRS”). The VCP program set forth in
 2 Rev. Proc. 2006-07, provides plan sponsors with the opportunity to correct operational plan
 3 defects, including the types of defects created by Millimaki’s, Eggert’s, and Berman’s
 4 mismanagement of the Plan.

5 36. As detailed below, the VCP submission involved significant costs paid by the Company
 6 on behalf of the Plan, and tremendous unreimbursed expenditures of time by the Company’s
 7 personnel. Moreover, the questionable rollover transaction (discussed in more detail below) is
 8 *not* remediable under the VCP program, and thus exposes the Plan – as well as the Company – to
 9 future audit problems and substantial potential liability.
 10

11 The IRS Compliance Statement and Corrective Action Requirements

12 37. After extended review of the VCP submission, the IRS identified a number of serious
 13 problems resulting from Millimaki’s, Eggert’s, and Berman’s mismanagement of the Plan.
 14 These problems, which involve violations of a number of provisions of the Internal Revenue
 15 Code, as well as the terms of the Plan itself, include:
 16

17 (a) Failing to provide documents correctly identifying the employer under the
 18 Plan (which originally triggered the need for the VCP submission);
 19

20 (b) Allowing ineligible employees – *including Millimaki’s own wife* – to
 21 participate in the Plan;

22 (c) Failing to meet contribution testing requirements governing highly
 23 compensated employees in *all five years tested* (1997 through 2001), resulting in excess
 24 contributions totaling \$22,220.80 for the years in question, and requiring the Company to make
 25 an additional contribution in that amount for its non-highly-compensated employees within 150
 26 days of receipt of the VCP; and

27 (d) Allowing plan participants to exceed maximum income deferral levels for
 28 the years 1996 through 2001.
 29

30 38. The IRS issued a Compliance Statement on August 5, 2007 conditioning the ongoing tax-

1 qualification of the Plan upon a complete restatement of Plan documents as well as the
2 completion of certain corrective actions and payments.

3 4 **The Questionable Rollover Transaction**

5
6 39. The VCP Compliance Statement also includes language to the effect that it may not be
7 relied upon by the Plan or the Plan Sponsor for the purpose of asserting that they were not parties
8 to an abusive tax avoidance transaction. In the VCP submission, the Company was obligated to
9 disclose to the IRS a transaction for which a Form 1099R was issued in 2005 by Millimaki to a
10 former Plan participant, for which neither the Plan's former trustees, Millimaki and Eggert, nor
11 the Plan's prior third party administrator, Berman, ever produced relevant records. This
12 transaction involved a substantial amount of money, possible tax avoidance by the former
13 employee, and potential tax liabilities to the Plan (all of which would become liabilities of the
14 Company) if the facts are finally uncovered by a future IRS audit. Therefore, the Plan remains
15 encumbered by significant potential claims and contingent liabilities. Moreover, to the extent
16 any such contingent liabilities become actual obligations, they will automatically accrue to the
17 Company, as the Plan's Sponsor.

18 19 **Summary of Damages**

20 40. As of October 31, 2007, the Company, on behalf of the Plan, had incurred and paid
21 significant professional fees and related costs in analyzing, reporting, and attempting to rectify
22 legal and accounting deficiencies in the Plan resulting from Millimaki's, Eggert's, and Berman's
23 above-described acts and omissions. These expenses include legal fees, retirement plan
24 consulting charges, and the costs of preparing the VCP submission and remedying the failures as
25 required under the IRS Compliance Statement.

26
27 41. In addition, the Company is obligated to contribute an additional \$22,220.80 to the Plan
28 on behalf of lower-compensated employees to equalize the excess contributions by highly
29 compensated individuals for the years 1997 to 2001.

30 42. Finally, the Company expects to incur additional professional fees to complete the

1 correction of all Plan deficiencies identified and required under the Compliance Statement. The
 2 total cost to the Plan and the Company is estimated to be a minimum of \$325,000.

3 CLAIMS FOR RELIEF

5 **First Claim For Breach of Fiduciary Duty under 29 U.S.C. § 1132 (a)(2) for appropriate** 6 **relief under 29 U.S.C. § 1109**

7 43. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

8 44. ERISA imposes a prudent man standard upon fiduciaries in their operation and
 9 administration of a qualified retirement Plan. ERISA imposes certain remedies for any failure to
 10 comply with these fiduciary duties, including relief under 29 U.S.C. §1132(a)(2): (a) Any
 11 person who is a fiduciary with respect to a plan who breaches any of the responsibilities,
 12 obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to
 13 make good to such plan any losses to the plan resulting from each such breach, and to restore to
 14 such plan any profits of such fiduciary which have been made through use of assets of the plan
 15 by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may
 16 deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a
 17 violation of section 1111 of this title.

18 48. Millimaki, as trustee, failed to adopt and implement an ERISA required Investment
 19 Policy Statement, or, at a minimum, to seek professional investment advice concerning the
 20 proper investment of the Plan's assets. This failure subjected the Plan to a loss of earnings, to be
 21 demonstrated according to proof. Under ERISA, Millimaki is required personally to make good
 22 any such losses to the Plan.

23 49. Eggert, as Millimaki's co-trustee, had an obligation to take action concerning these
 24 investment issues when he realized that Millimaki had failed or refused to do so. Millimaki is
 25 equally personally liable under ERISA §405, 29 U.S.C. §1105 for his failure to act, and should
 26 be require to make good any losses to the Plan occasioned by this failure.

27 49. Millimaki and Eggert likewise failed to provide appropriate investment options for the
 28 self direction of the participants' 401(k) deferral accounts as required under ERISA §404(c).
 29 Accordingly, any participant losses to the Plan may be recoverable as the fiduciary protections of
 30 §404(c) did not apply. See, e.g., *Larue v. Dewolff, Boberg & Associates, Inc. et al*, 128 S. Ct.

1 1020 (2008) (Sections 409 and 502(a)(2) authorize a participant in a defined contribution
2 pension plan to sue to recover losses to the plan caused by a fiduciary breach even though the
3 losses will be allocated to the participant's individual account).

4 **Second Claim For Breach of Fiduciary Duty under 29 U.S.C. §1132(a)(3)**

5 50. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

6 51. As Plan Administrator, Millimaki owed the Plan and its predecessors, the Company and its
7 predecessors (as the Plan's sponsors), and the Plan's participants strict fiduciary duties of trust,
8 loyalty, and due care. More specifically, the Plan, the Company, and the Company employees
9 who were participants in the Plan entrusted Millimaki with responsibility for (1) diligently
10 administering the Plan to ensure its compliance with all applicable tax regulations and other
11 requirements, (3) accurately reporting the Plan's activities to the appropriate regulatory
12 authorities, and (4) fully accounting for the Plan's assets to all interested parties, including the
13 Plan's beneficiaries. As a result of the operational defects that arose from Millimaki's failure to
14 manage and administer the Plan in accordance with ERISA, the Company has advanced
15 significant VCP fees, legal fees and other correction expenses on behalf of the Plan, awaiting the
16 VCP Compliance Statement. The Company seeks to recover these expenses from Millimaki.
17 Most of the fees and expenses sought are properly expenses of the Plan itself. The Plan
18 document in effect when all of these problems occurred states as follows about payment of
19 expenses from the plan:
20
21

22 "All expenses of administration may be paid out of the Trust Fund unless paid by the Employer.
23 Such expenses shall include any expenses incident to the functioning of the Administrator, or
24 any person or persons retained or appointed by any Named Fiduciary incident to the exercise of
25 their duties under the Plan, including, but not limited to, fees of accountants, counsel, investment
26 managers, agents (including nonfiduciary agents) appointed for the purpose of assisting the
27 Administrator or Trustee in carrying out the instructions of Participants as to the directed
28 investment of their accounts (if permitted) and other specialists and their agents, the costs of any
29 bonds required pursuant to Act Section 412 and other costs of administering the Plan. Until paid,
30

1 the expenses shall constitute a liability of the Trust Fund.”

2 52. Under ERISA a fiduciary may bring a claim to enforce and redress ERISA’s provisions,
3 and to obtain appropriate equitable relief. 29 U.S.C. §1132(a)(3). See, e.g., *Waller v. Blue*
4 *Cross*, 32 F.3d 1337, 1339 (9th Cir. 1994).

5 **Third Claim for Negligence against Defendant Berman under 28 U.S.C. §1367(a)**

6 53. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

7 54. At all times relevant to this dispute, Berman was obligated by virtue of his status as the
8 contract administrator of the Plan to exercise due care and reasonable diligence providing
9 services for the administration of the Plan, including preparation and maintenance of the Plan’s
10 documents, records, and data.

11 55. Berman breached his duties of due care and reasonable diligence. More specifically,
12 Berman maintained incomplete records, prepared and filed erroneous information returns with
13 the IRS for most years, participated in questionable rollover transaction that could cause
14 unreported tax liabilities for the Plan and other potential adverse consequences.

15 As a direct result and proximate result of Berman’s failure to exercise due care and reasonable
16 diligence, the Company and the Plan have suffered damages in an amount to be proven at trial, in
17 excess of the minimum jurisdictional limit of this Court, plus interest on those damages at the
18 maximum legal rate.

19 **Fourth Claim for Breach of Contract against Defendant Berman under 28 U.S.C. §1367(a)**

20 56. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

21 57. Berman agreed to provide and did provide third party administration services to the Plan and
22 the Former Trustees. Berman breached his obligations under the agreement by, among other
23 things, preparing defective Plan documents and otherwise failing to perform the services
24 standard in his industry.

25 **REQUEST FOR RELIEF**

26 The Successor Trustees and the Company hereby request the following relief:

27 1. An order imposing a constructive trust on the \$190,000 conditional payment to
28 Millimaki;

29 //

30 //

1 2. An order releasing the \$40,000 in escrow to the Company as reimbursement for the Plan
2 expenses it has incurred in correcting the operational defects and other costs associated with
3 Millimaki and Eggert's breaches of fiduciary duty;

4 3. An order requiring Millimaki to restore to the Plan lost profits resulting from his failure
5 to comply with his investment fiduciary duties;

6 4. An order requiring Millimaki and Eggert personally to make the Plan whole to the extent
7 not otherwise achieved, including any future, but presently unknown losses to the Plan arising
8 out of their tenure as Former Trustees;

9 5. An order under California law awarding the Company damages for Berman's negligence
10 and breach of contract;

11 6. An order for attorneys' fees and costs under ERISA, 29 U.S.C. §1132 (f); and

12 7. For such further order as the court deems appropriate.
13

14 Dated this 7th day of July, 2008

15
16 BRANTON & WILSON,
APC

17 By: 
18 PETA LEWIS HALLISEY
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**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

**# 152691 - MB
* * C O P Y * *
July 07, 2008
16:17:45**

Civ Fil Non-Pris

USAO #: 08CV1210 CIVIL FILING
Judge.: JANIS L. SAMMARTINO
Amount.: \$350.00 CK
Check#: BC20631

Total-> \$350.00

FROM: LYMS INC, YOUNGREN WENDY AND
MEANS, CATHY, SUCCESSOR
TRUSTEES OF LYMOS 401K PLAN VS
MILLIMAKI, BRUCE AND EGGERT, E

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

LYMS, INC.; Youngren, Wendy and Means, Cathy, Successor Trustees of the LYMOS 401(k) Plan

(b) County of Residence of First Listed Plaintiff San Diego
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Branton & Wilson, APC; 701 B Street, Ste 1255, San Diego, CA 921010. 619.236.1891; Peta Lewis Hallisey (see attachment)

DEFENDANTS

Millimaki, Bruce and Eggert, Michael, Former Trustees of the LYMOS 401(k) Plan

County of Residence of First Listed Defendant San Diego
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

BY: **08 CV 1210 JLS-NLS** DEPUTY

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input checked="" type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
			IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

29 U.S.C. section 1132

Brief description of cause:

Breach of Fiduciary Duty under ERISA

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

7.7.08

SIGNATURE OF ATTORNEY OF RECORD

Peta L. Hallisey

FOR OFFICE USE ONLY

RECEIPT #

152691

AMOUNT

\$350.00

APPLYING IFP

JUDGE

MAG. JUDGE

07/07/08

CIVIL COVER SHEET ATTACHMENT

I. (c): Second Attorney of Record:

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